APPENDIX A

IN THE DISTRICT COURT OF ANGELINA COUNTY STATE OF TEXAS

TEXAS FOUNDRIES, INC. X

VS. X

NO. 14,816-72-5

M. C. MANUFACTURING X
COMPANY, INC., ET AL X

JUDGMENT OF THE COURT

Came on to be heard on the 2nd day of August, 1974, the above styled and numbered cause, wherein Texas Foundries, Inc. is plaintiff and M. C. Manufacturing Company, Inc., and Universal Automatic Machines, Inc., are the remaining defendants in said cause, inasmuch as the defendant, the First National Bank of Marshall, Texas, has heretofore filed its plea of privilege and such plea of privilege has been sustained and the cause of action asserted by the plaintiff, Texas Foundries, Inc. against the defendant, the First National Bank of Marshall, Texas, has been severed from this cause and transferred to the District Court of Harrison County, Texas, and both the plaintiff, Texas Foundries, Inc. and the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. announced ready upon the plea in bar filed by the said two defendants and the Court having heard evidence in regard to the plea in bar of said defendants and having heard the statements and arguments of counsel thereon is of the opinion that the plea in bar filed by the defendants M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. should be and is in all things overruled.

It is accordingly ORDERED, ADJUDGED and DECREED that the plea in bar of the two defendants remaining in this cause, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc. is in all things overruled.

Thereafter, the plaintiff, Texas Foundries, Inc., and the defendants, M. C. Manufacturing Company, Inc., and Unviersal Automatic Machines, Inc. by and through their respective attorneys of record announced ready for trial on the merits. It appearing to the Court that the suit herein is a suit by the plaintiff against the defendants on a sworn account, and the Court having heard evidence with respect to said sworn account and the arguments and statements of counsel with respect thereto is of the opinion that the account is just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed and that the plaintiff should have and recover of and from the defendants, jointly and severally, the amount of such account in the sum and amount of Sixty Thousand Eight Hundred Ninety-Five and 82/100 ($60,895.82) Dollars.

It further appearing to the Court that due demand for the payment of such account was made on April 7, 1972 and that such account has not been paid and that interest on said account from and after January 1, 1973 amounts to the sum and amount of *Six thousand fifty eight and 79/100 ($6,058.79)* Dollars.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Texas Foundries, Inc. have judgment of and from the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc., jointly and severally, for the sum and amount of $60,895.82 and in addition thereto, interest in the sum and amount of *$6,058.79* or for the total sum and amount of *$66,954.61.*

It further appearing to the Court that due demand was made for the payment of such account on April 7, 1973 and that no payment was made on such sworn account, it became necessary for the plaintiff, Texas Foundries, Inc., to hire the

firm of Zeleskey, Cornelius, Rogers, Berry & Hallmark to collect such account and that by reason thereof and the refusal of the defendants to pay such account that Texas Foundries, Inc. has incurred attorneys' fees in the sum and amount of *$6,000.00*, which such fees are reasonable and necessary for such services as were rendered by such attorneys in Angelina County, Texas, and that in addition to the sums hereinabove set forth that the plaintiff should recover of and from the defendants attorneys fees in the sum and amount of *$6,000.00*.

It is accordingly ORDERED, ADJUDGED and DECREED that the plaintiff, Texas Foundries, Inc., do have and recover of and from the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc., jointly and severally, attorneys fees in the sum and amount of *$6,000.00*, such recovery being in addition to the sums hereinabove set forth in this judgment, which judgment shall bear interest at the rate of six (6%) percent per annum, and that plaintiff have and recover from defendants all costs of Court incurred herein and for which execution shall issue.

To which action of the Court in overruling the defendants, M. C. Manufacturing Company, Inc. and Universal Automatic Machines, Inc., plea in bar, such defendants in open Court duly and timely excepted thereto and gave notice of appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont.

SIGNED AND ENTERED this 28th day of August, 1974.

/s/ David Walker
Judge Presiding

NO. 7660

M. C. MANUFACTURING CO., INC., ET AT — APPELLANTS

V.

TEXAS FOUNDRIES, INC. — APPELLEE

Texas Foundries, Inc., a Texas corporation as plaintiff, brought this action as a sworn account in the State District Court in Angelina County. M. C. Manufacturing Co., Inc., and Universal Automatic Machines, Inc., both Texas corporations, were named as defendants. Trial was before the court and judgment was rendered for plaintiff. The parties will be referred to here as they were in the trial court, or by name.

Defendants' sole point of error here is that the trial court erred in overruling their plea in bar. Points of error as to overruling their plea in abatement were waived on oral argument. The allegations in the plea in bar and the evidence heard by the trial court showed the following: Before this state court case was filed, these defendants had filed a suit in the federal court against Texas Foundries, Inc., and H/R, Inc. That suit was for treble damages under the Sherman, 15 U.S.C.A. §§ 1-7 (1890), and Clayton, 15 U.S.C.A. §§ 12-27 (1914), Anti-Trust Acts. The federal court case was heard first resulting in a judgment for these defendants in the amount of $219,000. That case was pending on appeal in the Fifth Circuit at the time this state court case was tried, and also at the time of oral argument here.

The essence of defendants' contention here is that their suit was filed first, and under FED. R. CIV. P. 13 (a), the sworn account action brought by plaintiff was a compulsory counterclaim, and it had to be filed in the suit then pending in the federal court. The basis for that argument is that the action on the sworn account arose out of the transaction or occurrence that was the subject matter of the federal court action. This point of error is overruled.

We have not been cited nor have we found a case directly in point. Apparently, the approach taken in other cases was to attempt to secure an order enjoining the prosecution of the state court case, rather than a plea in bar. However, we see no reason why the same rules should not be applied to both types of cases.

In Reines Distributors, Inc. v. Admiral Corporation, 182 F. Supp. 226, 229 (S.D.N.Y. 1960), Reines sued Admiral in the federal court alleging violation of the anti-trust laws. Later, Admiral sued Reines in the state court on notes and an open account. Reines then sought an order in the federal court case enjoining Admiral from prosecuting these state court suits, which was denied with these statements of law:

> "We come now to plaintiff's argument based on Rule 13 (a) of the Federal Rules of Civil Procedure. That rule requires the defendant to set forth in his answer any counterclaim which he has against the opposing party 'if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.' In discussing this phase of the question, it must be borne in mind that the respective parties seek judgment strictly *in personam* and it has been held in such situations that:
>
> > " ' * * * both a State Court and a Federal Court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other, ' Penn General Casualty Co. v. Commonwealth of Pennsylvania 1935, 294 U.S. 189, 195, 55 S. Ct. 386, 389, 70 L. Ed. 850."

The Reines case was cited and followed in L. F. Dommerich & Co. v. Bress, 280 F. Supp. 590, 599 (D.N.J. 1968) saying:

"The foregoing rule [13 (a)] is considered by the Federal Courts to be a 'good housekeeping' rule, being procedural, avoiding a multiplicity of actions, where all claims between the opposing parties generally have a logical connection arising out of the same transaction or occurrence. . . . Plaintiff invokes 28 USC § 2283, contending that a stay of the State Court action should issue, where the effect of a state court judgment might tend to defeat or impair the jurisdiction, judgment, or orders of the Federal Court. . . . In determining whether an injunction should issue, we consider it unnecessary to reach the issue, of compulsory or permissive counterclaims. . . . We do determine that where both federal and state courts have concurrent jurisdiction of adverse parties seeking *in personam* judgments, then each may generally proceed with its separate litigation until judgment is rendered in one court which may be interposed affirmatively as *res judicata* in the other."

In Red Top Trucking Corp. v. Seaboard Freight Lines, 35 F. Supp. 740, 742-743 (S.D.N.Y. 1940), the plaintiff had asked the federal court to stay an action in the New York State Court on the ground that it arose out of the transaction involved in the federal court litigation, and that the state court action was filed subsequently. The Court said:

"The plaintiff would have this court construe the above Rule [13 (a)] to mean that, once having secured jurisdiction over a claim of action, whether in rem or in personam, the Federal Court thereby has jurisdiction over all claims which the defendant may have against the plaintiff arising out of the same subject matter.

"It is my belief that this construction is erroneous. (at 724)

* * *

"... [I]t is my feeling that there is no discretion in this court, where the actions involved are in personam, but that it must refuse the injunction." (at 743)

In Fantecci v. Gross, supra, the plaintiff contended that Rule 13 (a) gave the federal courts the authority to enjoin state court actions involving claims arising out of a transaction already involved in a federal court case. The Court held that it was unwilling to say that Congress, in adopting Rule 13 (a), intended to grant federal courts the authority to enjoin state court actions. See also, Sessions Company v. W. A. Scheaffer Pen Company, 344 S.W. 2d 180 (Tex. Civ. App. – Dallas 1961, writ ref'd n.r.e.).

In both the state court and federal court cases, *in personam* judgments are sought, and there is no final judgment in either case; so, the issue as to *res adjudicata* is not before us.

Whether we would reach the same result had the federal court judgment been final when the trial court heard the plea in bar is not presented by this record, and we express no opinion thereon.

Judgment AFFIRMED.

Homer E. Stephenson
Associate Justice

Opinion delivered
January 30, 1975

APPENDIX B

CLERK'S OFFICE-SUPREME COURT

Austin, Texas, July 9, 1975.

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of

No. B-5161

M. C. MFG. CO. VS. TEXAS FOUNDRIES

was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX C

The State of Texas

To the *DISTRICT* Court of *ANGELINA* County, GREETINGS:

Before our Court of Civil Appeals on the *30* day of *January* A.D. *1975* the cause upon appeal to revise and reverse your judgment between

M. C. MANUFACTURING COMPANY, INC., ET AL

No. *7660* and

TEXAS FOUNDRIES, INC.

was determined; and therein our said Court of Civil Appeals made its order in these words:

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, M. C. Manufacturing Co., Inc., et al, and the sureties on his appeal bond, Jim Ammerman and J. Ray Kirkpatrick, pay all costs in this behalf expended; and this decision be certified below for observance.

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Civil Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness, the Hon. *MARTIN DIES, JR.,* Chief Justice of our said Court of Civil Appeals of the Ninth Supreme Judicial District of Texas, with the Seal

thereof annexed, at the City of Beaumont, this the *23* day of *July* A. D. 19*75*

SEAL

JOE A. HULGAN
Clerk

/s/ By *Joe A. Hulgan*

A TRUE COPY I CERTIFY